McNAGHTEN'S CASE AND BEYOND.

No judicial expression has, perhaps, so vitally influenced the administration of the criminal law as the opinion delivered by the English judges in the House of Lords, on June 19, 1843, usually reported as McNaghten's Case.[1] It has been rigorously followed since in England, being copied verbatim in many English and American text-books, and has crystallized the doctrine of insanity as a defence in criminal trials in a majority of the jurisdictions in the United States.

In this so-called case, five questions were propounded to the judges, the answers to which, it was thought, would be a thorough exposition of the law of England concerning insanity as a defence to prosecutions for crime.

It is the purpose of this article to discuss only two of these questions, with the answers thereto, viz: those usually cited as authority for the doctrine that in criminal trials, where insanity is the defence, the burden is on the defendant to prove insanity, and if the jury, after hearing all the evidence, are in doubt on this question, they must convict the prisoner.

The history of this opinion is a peculiar one, and the circumstances under which it was delivered were well calculated to impress the public mind of England, for which purpose, indeed, it was intended. But it is difficult to understand the influence it has exerted on the Bench and Bar for so many years.

McNaghten, having causelessly killed a most estimable gentleman in the streets of London in the open day, was tried for murder before Chief Justice Tindall and Justices Williams and Coleridge, and acquitted on the ground of insanity. Public indignation was greatly aroused; the *British and Foreign Medical Review* stated that the verdict "has completely overturned the old doctrine of implied

[1] 10 Cl. & F. 200.

malice in law;" Sir V. Blake moved for leave to bring in a bill in the House of Commons to abolish the plea of insanity in cases of murder, or attempts to murder, except when it could be proved that the accused was publicly reputed to be a maniac;[2] and the case finally became the subject of debate in the House of Lords,[3] and a change in the existing law was there agitated. The Lord Chancellor reviewed in the debate the common law, demonstrated that only those who were hopelessly insane were excused under that law, and opposed any change—the only one thought of being a change to a more rigorous accountability.

Lord Brougham thought the public, especially the criminal public, were becoming imbued with the heretical doctrine advanced by certain eminent physicians, that all men were more or less insane; and that as some judges had made the test of insanity "the capacity to know right from wrong," others "the capacity to know good from evil," others "the knowing what was proper" and others, "what was wicked," it would tend to uniformity to have an authoritative opinion on the existing law; he also objected to the course of Tindall, C. J., in virtually taking the case from the jury.

Lord Cottenham also thought it would tend to uniformity to have an opinion from the judges.

Lord Campbell feared that Tindall, C. J., in taking the case from the jury after hearing the testimony of experts, had created "the impression on the public mind that if a certain number of medical witnesses, generally called mad doctors, had come into court and said that in their opinion the prisoner was insane when he committed the act, the trial was to be stopped, *cadit questio;*" that "the public mind was in considerable alarm on this subject. The public had been inundated by medical books calculated very much to mislead juries in case of future trials."

It was finally agreed to call on the judges to appear in the House and answer certain questions concerning the existing law on this important subject. Two precedents were found for this course, and on June 19 the judges appeared.

[2] Hansard's Debates, Vol. LXVII, p. 424.
[3] Hansard, Vol. LXVII, pp. 288, 714.

The judges gave their answers most reluctantly, Maule, J. saying:

"I feel great difficulty in answering the questions put by your lordships on this occasion. First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the bar and court being confined to questions arising out of the facts of particular cases. Secondly, because I have heard no argument at your Lordships' bar *or elsewhere,*[4] on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal laws of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice, when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions; but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after a very short time which I have had to consider these questions, and under the difficulties I have mentioned; fearing that my answers may be as little satisfactory to others as they are to myself."

Lord Chief Justice Tindall speaking for the other judges, says: "Her Majesty's Judges . . . think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every

[4] Italics mine.

shade of difference in each case; and . . . it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon," etc. Thus it appears that not only were the judges averse to giving an opinion on so important and difficult a subject (a subject that the Lord Chancellor admitted in the debate was little understood), with so little time for study, and without the help of counsel, but also that they felt that the opinion when given would be of little value. In this, however, they builded stronger, if not better, than they knew.

So much then for the estimate of the judges themselves on the general opinion they were about to deliver. How does the case stand as to the value of that part of the opinion that has been accepted as authority for the rule as to the burden of proof?

While the judges lament the lack of time for preparation and the absence of argument of counsel, it is reasonable to suppose that they had read the debate that was the immediate cause of the call for their opinion, and that what study they had given to the subject had been devoted to those parts of it which the debate showed were regarded by the Lords as important and doubtful. An examination of this debate shows that the only questions agitating the minds of the public and the Lords were (1) the *test* of insanity, *i. e.*, the kind and degree of insanity that would excuse its victim from punishment for an act which if done by a sane person would bring upon him the sanction of the law; (2) the right of the trial judge to usurp the functions of the jury; (3) the legality of allowing experts not previously acquainted with the accused to testify as to their opinion of his sanity. No word was said in the debate even remotely bearing on the question of the burden of proof. When the judges appeared, however, in addition to the questions concerning these points, the following were submitted:

"2d. What are the proper questions to be submitted to the jury when a person alleged to be inflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?"

"3d. In what terms ought the question to be left to the

jury, as to the prisoner's state of mind at the time when the act was committed?"

Just what was intended by these two questions it would be difficult to say, and after reading them one sympathizes with Justice Maule in his desire to hear counsel.

That the judges themselves did not see the drift of them appears by a comparison of the answer given to them by Justice Maule and the other judges.

Maule, J. answers as follows:

"Second, the questions necessarily to be submitted to the jury, are those questions of fact which are raised in the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions, as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge; a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, in a trial such as is suggested in the question, he should have occasion to state what *kind and degree*[5] of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being in my opinion, the law on this subject." The learned judge had stated in his answer to the first question that the kind and degree of insanity that would excuse must be an unsoundness of mind that rendered the prisoner incapable of knowing right from wrong.

"Third, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused."

It is perfectly clear from these answers that the questions

[5] Italics mine.

did not suggest to the mind of the learned judge any proposition involving the burden of proof. The first question submitted was directed to the *test* of insanity in cases of delusion, and Justice Maule's answer to that question is entirely responsive; his answer to the second, says, in effect, that if he felt called on to instruct the jury as to the law he should instruct them in the terms of his answer to the first question; his answer to the third repeats this, and adds, "there are no terms which the judge is by law required to use."

The other judges, speaking through Tindall, C. J., though they respond categorically to the other three questions submitted, viz: the first, fourth and fifth, involving the test of insanity and the question of expert evidence, think "these two questions . . . . more conveniently answered together" and submit their opinions to be "that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused at the time of the act knew the difference between right and wrong," etc.

In this statement the judges have really answered only the third question, "In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?" Instead of an answer to the second question, "What are the proper *questions* to be submitted to the jury," in which Maule, J. sees a query as to kind and degree of insanity, they reply, "The jurors ought to be told that every man is presumed to be sane," etc., which does not submit *any question* to the jury, but rather gives binding instructions that may take from them the question of questions, viz: has the prosecution proved one of the essential elements in the crime, the evil intent.

This part of their answer would, if this proceeding had been an ordinary hearing on appeal, be called dictum.

It should be added that in this solemn pronouncement of the law of England on a most important branch of the criminal law, the majority of the judges do not cite a single precedent, and the only case cited by Maule, J. is the very case (McNaghten's) that gave rise to the proceedings.

Yet it is this dictum, in an opinion rendered without the benefit of previous argument by counsel; with little time for preparation; and in a proceeding contrary to the whole spirit of the common law, whose expositors have always repudiated with fine scorn the *responsa prudentum* of the Roman law, which this so closely resembles; prophetically protested against by the judges themselves as likely to embarrass the administration of justice; and under the fear of one that the answers might be as little satisfactory to others as they were to himself; with the citation of a single authority, and that a discredited one, that is cited by the English judges and the majority of the courts in the United States to-day as authority for the proposition that at common law the burden of proving insanity is on the defendant.

It is to be noted that this is not a case of first impression or a case arising under a statute where by judicial construction *new* law is made by the judges. Here the question was, shall there be legislative action on the law of insanity, and in order to decide that question the judges are asked what is the existing law of the subject. The answers of the judges therefore were authoritative only in so far as they declare the *existing* law as gathered from previous decisions.

What then was the law on this subject as understood by the Bench and Bar of England previous to McNaghten's Case? One of the earliest criminal cases reported at length involving the question of insanity is Arnold's Case,[6] tried in 1724. Arnold was indicted for a felony in wounding Lord Onslow. The fact of the wounding was admitted, and the prisoner set up insanity as a defence. Much evidence was produced on both sides touching the prisoner's state of mind. Justice Tracy, after rehearsing the evidence, charged the jury as follows:

[6] 16 How. St. Tr. 695.

"That he shot, and that willfully, is proved; but whether maliciously, that is the thing; that is the question; whether this man hath the use of his reason and sense? If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty. . . . This is on one side. On the other side we must be very cautious; it is not every frantic and idle humor of a man that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption; therefore, it is not every kind of frantic humor or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; therefore, I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side or on the other, doth show a man who knew what he was doing, and was able to distinguish whether he was doing good or evil, . . . and if you believe he was sensible, and had the use of his reason, and understood what he did, then he is not within the exemptions of the law, but is as subject to punishment as any other person. Gentlemen, I must leave it to you."

There are several things to be noted in this charge. The first is the recognition of the principle, sometimes overlooked by judges, involved in the defence of insanity.

"If a man be deprived of his reason, and consequently of his intention, he cannot be guilty," says Justice Tracy. Every element that goes to make up the crime must be proven by the prosecution; intention is one of these elements and, unless the jury are satisfied by the prosecution beyond a reasonable doubt that the prisoner was sane, one of the elements of guilt is not made out. The charge is severe against the

prisoner, "he must be totally deprived of his understanding" and "not know what he is doing, more than an infant, than a brute, or a wild beast," yet severe as it is it does not instruct the jury that to establish the defence "it must be clearly proved" by the *prisoner* that he was insane. There is a sentence that at first sight appears to say this, but on closer inspection it in fact says something very different. Says the court:

"On the other side, we must be very cautious; it is not every frantic and idle humor of a man, that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, *it must be very plain and clear,* before a man is allowed such an exemption; *therefore,* it is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a madman as is exempt from punishment."[7]

The court is here speaking not of the burden of proof, but of the test of insanity; not of who must prove sanity or insanity, but of the extent of the insanity that deprives a man of intent and will; it is not that the *proof* must be clear; but that the insanity must be clear and plain insanity and not a mere "something unaccountable in his actions." The prisoner might give the clearest proof of a "frantic and idle humor" but that would not excuse him; but suppose he gave less evidence than would "clearly prove" such clear and plain insanity as the court is speaking of, yet enough to raise a reasonable doubt of his sanity, what then should be the verdict of the jury? This is the question of the burden of proof, and the judges in McNaghten's Case say the jury should convict. The court in Arnold's Case does not answer the question directly, but does answer it indirectly in the light of the well-known rules of the criminal law, that the prosecution must prove the full crime beyond a reasonable doubt, by saying that "if a man be deprived of his reason and consequently of his intention, he cannot be guilty." The court further answers the question in saying, "I must leave it to your consideration, whether the condition this man was in, as it is represented to you on the one side or the other, doth show a man who knew what he was doing."

[7] Italics mine.

That the court in the use of the words "clear and plain" is speaking of the *extent* of insanity only, is further shown by the word "therefore," connecting the two parts of the sentence, and the word "such," qualifying madman. "It must be very clear and plain, . . . *therefore* it is not every kind of frantic and idle humor . . . that points him out to be *such* a madman."

It is significant that in Hadfield's Case, *infra*,[8] the Solicitor General speaking for the prosecution quotes this charge almost verbatim, but omits the words "it must be very clear and plain," thinking, probably, that they rather detracted from the force of the statement of the law for which he was quoting Tracy, J., that the insanity must be a total insanity.

A more important case, in view of the tribunal before which it was tried, was that of Earl Ferrers,[9] who was indicted for murder, in 1760, before the House of Lords, "a set of judges," he was reminded by the Lord High Steward, "whose sagacity and penetration no material circumstances in evidence can escape, and whose justice nothing can influence or avert."

Mr. Perrot, afterward a baron of the Exchequer; Mr. Yorke, Solicitor General, and the Attorney General, afterward Lord Camden, C. J. of the Common Pleas and Lord Chancellor, conducted the prosecution.

There was, of course, no charge in this case, the Lords simply voting guilty or not guilty, but the address of the Solicitor General states the law on the subject of insanity, that being the defence, the killing being admitted by the prisoner.

In this address the Solicitor General clearly recognizes and accepts the burden of proving the prisoner's sanity as necessary to the proof of his guilt. He says:[10]

"My Lords, it is certainly true, that the fact is not murder without malice, . . . and malice must depend in every case upon the will and understanding of the party." Pages of argument could add nothing to this clear statement of

[8] P. 276.
[9] 19 How. St. Tr. 885.
[10] Col. 946.

the law, and the inference from it. The prosecution must prove the fact, and that it was done with malice, malice must depend upon the understanding; the prisoner claims he had no understanding, hence no malice; the prosecution must prove the understanding as a pre-requisite to the proof of malice.

Having laid down the general principle, he proceeds to show to the Lords that the prosecution *has* proved malice, summing up, "This is the substance of the evidence, which has been offered for the King; and it not only proves the fact, but proves it to be murder. My Lords, what is the evidence produced by the noble lord to weaken the force of it?"

Here again we see the plaintiff and defendant in their proper positions, the *prosecution* proving, the *defence* weakening, the force of the evidence. In closing he still more clearly shows his recognition of the principle that the defence of insanity is only a denial of malice or intent, and does not shift the burden of proof. "The counsel who attend your Lordships for the King," he says, "chose to submit it to your opinions, whether the evidence produced for the prisoner does not tend to strengthen, rather than weaken, that proof of capacity, which arises out of all the circumstances urged in support of the charge."

It was said by the Solicitor General in *Rex.* v. *Hadfield, infra,*[11] in commenting on this address, "To the law thus laid down upon that trial, all the judicial authorities in the kingdom must be deemed to have given their assent; the judges sitting there as assistants of the House, heard the law thus laid down; and if such was not the law, it was their duty to have declared the contrary."

The next important case was that of *Rex* v. *Kinloch,*[12] tried in 1795, in the High Court of Justiciary at Edinburgh, and conducted by eminent judges and counsel. The killing by the prisoner, Sir Gordon Kinloch, of his brother-German, Sir Francis Kinloch, was an admitted fact in the case and the only question at issue was the sanity or insanity of the prisoner.

[11] P. 276.
[12] 25 How. St. Tr. 891.

Here again if we study the charge of the court carefully we fail to find any authority for the answers of the judges to the third and fourth questions in McNaghten's Case, though there are expressions which at first sight seem to be in line with those answers. The court says: "It will occur to any man of sense and judgment, that there are different degrees of insanity. If a man is totally and permanently mad, that man cannot be guilty of a crime. . . . The next insanity that is mentioned in our law books is one that is total, but temporary. When such a man commits a crime, he is liable to trial; but, when he pleads insanity, it will be incumbent on him to prove that the deed was committed at a time when he was actually insane. There is still another sort of distemper of mind, a partial insanity, which only relates to particular subjects or notions; such a person will talk and act like a madman upon those matters; but still if he has as much reason as enables him to distinguish between right and wrong, he must suffer that punishment which the law inflicts on the crime he has committed."

The words of the court "it will be incumbent on him to prove that the deed was committed at a time when he was actually insane," if wrenched from the context would seem to place the burden of proving insanity on the prisoner; but here the court is instructing the jury on the *kinds* of insanity, as in Arnold's Case, *supra,* it was speaking of the test of insanity. The court is making it clear to the jury that when the defence is *total* but *temporary* insanity, the act must have been done while the prisoner was under the duress of the disease in order to render him innocuous to punishment and not during a lucid interval.

The question of the burden of proof is approached further on in the charge, and there we find no such binding instructions as say the judges in *McNaghten's Case* should be given. Says the court: "Gentlemen, you will consider the evidence and decide according to your consciences. If you are convinced that he knew right from wrong, you will return a verdict of guilty. On the other hand, if it shall appear to you that he was not able to distinguish between moral good and evil, you are bound to acquit him." In this charge if the court were *astute* in the choice of words, it would seem

that they rather placed the burden on the prosecution; if the jury are "convinced," they are to find the prisoner guilty, "if it shall appear" they are to acquit. By no reading can it be an authority for the position of the judges in McNaghten's Case.

This case afforded an excellent opportunity for the contention that the burden of proof was on the prisoner because of the presumption of sanity, for a great portion of the evidence was directed to the state of mind of the defendant previous to the killing; and the effect of that evidence as bearing on his sanity at the time of the killing was dwelt on at length by counsel on both sides; yet though the counsel for the prosecution argues zealously for a conviction, we find nothing in his address to the jury of presumptions of sanity or of the doctrine erroneously supposed to flow therefrom. We do indeed find him speaking of the prisoner "establishing the defence," and of whether "the evidence adduced is sufficient to warrant the conclusion" that he was insane, yet in summing up his address, having just told the jury that the killing being admitted, the only question before them was the issue of insanity, he says: "Should the result (of the evidence) be to balance the whole nearly equally in your minds, God forbid that, when the life of a fellow-creature is concerned, I should attempt to persuade you, were the attempt likely to succeed, that the scale should not be inclined to the side of mercy."

A clear recognition and that by a zealous prosecution, that the burden of proving sanity lies on the state, and that if the jury are in doubt on the question they must acquit.

Five years later, in 1800, we have the celebrated trial of James Hadfield[13] for high treason, in attempting to murder the King. This case was tried before the Court of King's Bench, Lord Kenyon, C. J. and Grose, Lawrence and Le Blanc, J. J. presiding. Perhaps no case has ever been conducted by more eminent counsel. For the Crown appeared the Attorney General, Sir John Mitford, afterwards Lord Redesdale; the Solicitor General, Sir Wm. Grant, afterwards Master of the Rolls; Mr. Law, afterwards Lord

[13] 27 How. St. Jr. 1281.

Ellenborough and Chief Justice of the King's Bench; Mr. Garrow and Mr. Wood, afterwards Barons of the Exchequer; and Mr. Abbott, afterwards Chief Justice of the King's Bench. The Hon. Thomas Erskine, afterwards Lord Chancellor, Mr. Sergeant Best, afterwards Judge of the King's Bench, Mr. Knapp and Mr. Humphries appeared for the prisoner.

During the trial, in which the shooting was proven, and much evidence of insanity introduced, the Solicitor General clearly accepted the burden of proving sanity, in such expressions as, "If he possessed that degree of sense which enabled him to judge whether the act he was committing was right or wrong, that has constantly been held sufficient to induce a jury to find infants of tender years guilty of offences," and in reviewing Arnold's Case, "That he had a steady and resolute design, and used all proper means to effect it; that was considered by the counsel who opened the case to the jury, as that which it was necessary to show, *in order to demonstrate* that this man (whatever might be at times the state of his mind) at the time when he did this act had so far the possession of his mind," etc.[14]

Again in quoting Tracy, J. in the same case, "I must leave it to your consideration whether the condition this man was in, as it is represented to you on the one side and the other, doth show a man who knew what he was doing."

At the close of the trial and after a masterly address by Mr. Erskine, in which he analyzed the various kinds of insanity and the law applicable thereto, Lord Kenyon said: "Mr. Attorney General, can you call any witnesses to contradict these facts (facts testified to as evidence of insanity)? With regard to the law, as it has been laid down, there can be no doubt upon earth; to be sure, if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts; but the material part of this case is, *whether at the very time when the act was committed this man's mind was sane.* I confess, the facts proved by the witnesses (though some of them stand in near relationship to the prisoner, yet others do not) bring home conviction to one's mind, that

[14] Italics mine.

at the time he committed this offence, and a most horrid one it is, he was in a very deranged state. I do not know that one can run the case very nicely; if you do run it very nicely, to be sure it is an acquittal. *His sanity must be made out to the satisfaction of* a moral man, meeting the case with fortitude of mind, knowing he has an arduous duty to discharge, *yet if the scales hang anything like even,* throwing in a certain proportion of mercy to the party."[15]

Certainly there are no variations from the normal here that in forty-five years, by natural selection, or otherwise, could have evolved the thing we find the judges presenting to the House of Lords in 1843. We must conclude it was a special creation.

In the next case, *Rex* v. *Bellingham,*[16] the prisoner was tried for the murder of the Chancellor of the Exchequer. There was no doubt of the killing by the prisoner, indeed he admitted it, claiming he had done the act because the deceased had refused to redress a grievance of the prisoner. He refused to plead insanity, but this defence was interposed by his counsel. The Attorney General and the court both recognized the principle that the plea of insanity was merely a denial of malice or intent, the former saying: "I know very well the principle upon which insanity is received as a defence; I know that the man to whom I should impute insanity, must be one that is incapable of malice;" the court adding, "such a man could have no intention at all." The court in its charge, however, goes even further than the judges in their answers in McNaghten's Case. Collinson reports Mansfield, J. saying:

"In order to support this defence (insanity), however, it ought to be *proved by the most distinct* and unquestioned *evidence,* that the criminal was *incapable* of judging between right and wrong. It must in fact *be proved beyond all doubt,* that at the time he committed this atrocious act . . . he did not consider that murder was a crime against

[15] Italics mine.

[16] Tried in Old Bailey in May, 1812, before Mansfield, C. J., Grose, J., and Graham, B. It does not appear to have been reported in any of the regular reports, but may be found as an addendum to Collinson's Law of Lunatics.

the laws of God and nature. There is *no other proof* of insanity that will excuse murder or any other crime."

If this charge had ended here it would have been a precedent, not indeed for the rule announced by the Judges in McNaghten's Case that insanity "must be clearly proved," nor even for the harsher rule abandoned by all but a few jurisdictions, that the prisoner must prove insanity "beyond a reasonable doubt," but for the rule that he must prove it "beyond all doubt," a rule never promulgated by any judge, before or since.

The report of this charge, however, continues: "His lordship concluded by exhorting the jury to take the facts into their most serious consideration; *if they* entertained any doubt, they would give the prisoner the benefit of it; but if they believed him guilty, they would find him so." Now as the prisoner and his counsel admitted the killing, and as the court had instructed the jury that the defence of redressing the supposed grievance was not a legal defence, nothing remained about which the jury could entertain a doubt except the insanity of the prisoner. Unless we believe that Lord Mansfield in one breath told the jury to convict the prisoner unless he proved beyond all doubt his insanity, and in the next to acquit him if there was a doubt of his sanity, we must come to the conclusion that the charge is incorrectly reported; and that this is the true solution of the difficulty appears from the debate in the House of Lords concerning McNaghten's Case, when the Lord Chancellor, reading from the shorthand notes of Bellingham's Case, quotes Lord Mansfield as saying to the jury: "The question is this, whether *you are satisfied* that he (the prisoner) had a sufficient degree of capacity to distinguish between good and evil, and to know that he was committing a crime when he committed the act; *in that case* you will find him guilty." This announces a very different proposition of law, and one that is entirely in line with the previous authorities reviewed.

In *Bowler's Case*,[17] tried at Old Bailey a few months later, Le Blanc, J. charged the jury in practically the same language as that just quoted from the Lord Chancellor.

[17] Collin. Lun. Add.

It is not until 1831, only twelve years before McNaghten's Case, that we find the doctrine that has governed the courts for more than a century infringed upon, and then by a single judge in a case tried in circuit, *Rex* v. *Oxford*.[18] The report of this case reads: "Lord Lyndhurst, C. B. (in summing up), told the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know. . . . His lordship referred to the doctrine laid down in Bellingham's Case by Sir James Mansfield, and expressed his complete accordance in the observations of that learned judge."

We have seen that this learned judge laid down no such doctrine in Bellingham's Case; but it is not difficult from what has been previously said on that case, to understand how Lord Lyndhurst was misled, especially if, as is not improbable, the case not being found in any of the regular reports, he read the report of it given in *Russell on Crimes*, the standard English authority, where that portion of the charge of Lord Mansfield which instructs the jury that if they entertained any doubt they would give the prisoner the benefit of it, is omitted. This case, therefore, founded as it is on a misconception of the doctrine laid down in another case, and tried by a single judge on circuit, may be dismissed from consideration as authority.

In *Reg.* v. *Tyler and Prince*,[19] tried seven years later, and five years before McNaghten's Case, we get back to the normal rule. In this case Denman, C. J. charged the jury: "In order to make out that part of the charge which imputes to Thom the act of murder, and that these persons were guilty of aiding and abetting him to commit the murder, it would be necessary to show that Thom was a person capable of committing that murder. In order to make out the malicious intention imputed in the verdict to the act of Thom *he must be shown to have been of sound mind*[20] at the time when he committed it; for it is a maxim of law that persons not of sound mind cannot be held responsible for their acts."

The last case before McNaghten's, involving this question,

[18] 5 Car. & P. 168.
[19] 8 Car. & P. 616.
[20] Italics mine.

is *Reg.* v. *Oxford.*[21] Oxford was tried in the Central Criminal Court in 1840 for high treason in shooting at the Queen. Denman, C. J. delivered the charge to the jury, and if his remarks as reported in Carrington and Payne are given correctly, this case would afford the first authority for the rule announced in McNaghten's Case. In this report the judge is quoted as saying: "Persons *prima facie* must be taken to be of sound mind till the contrary is shown," which of course is in itself a correct statement of a presumption, and later says, "upon the whole the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane . . . whether the evidence given proves a disease of the mind." Again, "The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature . . . of the act he was committing."

The charge nowhere instructs the jury that if they have a reasonable doubt of the prisoner's sanity they must convict him, as do the charges in cases subsequent to McNaghten's Case, but, taken as a whole, the charge as thus reported would justify such a conclusion. In the much more extended report of this case given in the *State Trials,* however, while the reporter adopts language similar to this in his head note, and reports in the same words the remarks of the judge as to the presumption of sanity, instead of the language requiring the jury to be *satisfied* of the prisoner's sanity, thus throwing the burden of proof on him, the court is reported as saying, "if you think he was so unconscious at the time, then undoubtedly you will be bound to say that he was insane and not responsible." To show that this was no chance disagreement of the reporters, the report in the *State Trials* has a note immediately after the sentence just quoted giving the language in Carrington and Payne's report.

When it is considered that Denman, C. J. was the same judge who two years before in *Reg.* v. *Tyler, supra,*[22] so unqualifiedly laid down the rule that the prisoner "must

[21] 4 St. Tr., N. S. 497; 9 Car. & P. 525.
[22] P. 280.

be shown to have been of sound mind," there can be little doubt as to which report is the more correct.

That McNaghten's Case, in laying down the rule that the burden of proving insanity is on the prisoner, is erroneous in principle has been clearly shown by Professor Thayer,[23] Harlan, J.[24] and Cooley, C. J.[25] That it finds no support in precedent a study of the adjudged cases for a century and a quarter previous would seem to demonstrate.

William E. Mikell.

[23] Thayer, Ev. 382.
[24] *Davis* v. *U. S.*, 160 U. S. 469.
[25] *People* v. *Garbutt*, 17 Mich. 9.